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IN THE

SUPREME COURT OF THE UNITED STATES

October term, 1982

NO.....

ADRON P. BRAINERD,
Petitioner,

-vs-

WARREN E. BURGER, Chief Justice,
United States Supreme Court, and
H. S. CUNNINGHAM, Clerk of the
United States Districk Court,
Northern Division of Illinois,
Eastern Div.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

A. Can H.S. Cunningham, Clerk of the United States District Court, Northerm District be granted judical immunity for improper docket entries and false certification of the record?

B. Can the United States District Court, Northern District of Illinois, Easterm Div., ORDER the clerk to enter a proper Rule 58 judgment in 72 C 1571 action under Rule 60(a)?

C. Can Warren E. Burger, Chief Justice, United States Supreme Court be granted judical immunity for improper supervision of the clerk's docket entries?

CITATIONS

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The petitioner Adron P. Brainerd, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceedings on March 11, 1982, with a rehearing denied on April 19, 1982. A continuance of sixty days was granted by the United States Supreme Court with the date of filing a Writ of Certiorari due on or before September 16, 1982.

OPINION BELOW

The opinion of the Court of Appeals appears at pages 1 through 3 and the opinion of the United States District Court, appears at pages 4 through 13 in the appendix which is attatched hereto behind the petition.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on march 11, 1982. This Court's jurisdiction is invoked under 28 U.S.C., section 1254(1).

QUESTIONS PRESENTED

A. Can H.S. Cunningham, Clerk of the United States District Court, Northerm District be granted judical immunity for improper docket entries and false certification of the record?

B. Can the United States District Court, Northern District of Illinois, Easterm Div., ORDER the clerk to enter a proper Rule 58 judgment in 72 C 1571 action under Rule 60(a)?

C. Can Warren E. Burger, Chief Justice, United States Supreme Court be granted judical immunity for improper supervision of the clerk's docket entries?

DEFENDANT'S STATEMENT OF FACTS

On June 27, 1972, plaintiff filed a pro se complaint in the United States District Court, Northern District of Illinois, (Brainerd v. Beal, et al., No. 72 C 1571) against two bank officers which alleged violations of several federal statuttes. After securing representation by an attorney, plaintiff filed an amended complaint. On January 30, 1973, the District Court granted the defendant bank officers' motion to dismiss the amended complaint and entered a minute order to that effect; The docket entry for that order appears as follows:

1-30-73 Order defendants' motion to dismiss plaintiff's amended complaint is granted. Order plaintiff's amended complaint is dismissed. (Court's Memorandum opinion will be filed within short date) - Will, J. (JS6) Mailed Notices 2-1-73

The docket did not indicate that a judgment was ever set forth on a separate document as required by Rule 58, Federal Rules of Appellate Procedure (Fed. R. Civ. P.)

Plaintiff attempted to take an appeal from the January 30, 1973 order by filing a notice of appeal on March 2, 1973. Brainerd v. Beal, 498 F.2d 901, 902 (7th Cir.), cert; denied, 419 United States 913 (1975). March 2, 1973, was thirty-one days after January 30, 1973. The Seventh Circuit dismissed the appeal because the notice was not filed within thirty days from January 30, 1973, as required by Rule 4(a), Federal Rules of Appellate Procedure.

The court rejected affidavits signed by a deputy clerk which contradicted the docket by stating that an order dated January 30th normally would have been entered on January 31st or February 1st; instead the court accepted the docket sheet as it appeared on its face.

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Plaintiff alleges that after his appeal was dismissed he filed a state court action against his attorney, apparently for legal malpractice. Brainerd v. Kates, 25 Ill. Dec. 315, 386 N.E.2d 586. The state court allegedly granted the attorney defendant's motion for summary judgment following submission of an affidavit made by H. Stuart Cunningham, of the U.S. District Court Clerk. The affidavit stated that the January 30th order in Brainerd v. Beal was filed within thirty days of the date the order was entered on the docket.

On the basis of these facts plaintiff filed a three-count complaint against defendants' Burger and Cunningam. Count I abridged plaintiffs' constitutional right of access to the courts, thereby violating 42 U.S.C., section 1983 as well as rights secured by the First, Forth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

In Count II, plaintiff alleged that defendant Cunningham violated the Freedom of Information Act (FDIA), 5 U.S.C. section 552, by failing to respond to plaintiff's January 18, 1978 request to produce all papers related to the notice of appeal and the docketing procedure in Brainerd v. Beal.

In Count III, plaintiff alleged that defendant Burger breached his supervisory duties over the Federal Courts with regard to Rules 58 and 79(a) of the Federal Rules of Civil Procedure and wrongfully failed to grant certiorari and remand the case of Brainerd v. Beal.

Plaintiff sought damages from both defendants in the amount prayed from both defendants in the amount prayed for in Brainerd v. Beal as well as damages resulting from a posible action by plaintiff's former attorney, Richard Kates; Attorney fees, costs and other appropriate relief were also prayed for.

Defendants moved to dismiss Counts I an III for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted. Defendant Cunningham moved for judgment on the pleadings with respect to Count II. The District Court dismissed Counts II and III on October 11, 1978.

On October 25, 1978, plaintiff filed a motion (at the Court's suggestion), "...TO CORRECT CLERICAL MISTAKES AND OMISSIONS IN BRAINERD VS. BEAL, 72 C 1571" which sought an order requiring the clerk to enter an order as required by Rule 58 and 79(a), Fed. R. Civ. P. from which an appeal could be taken.

A. REASONS FOR GRANTING THE WRIT

I.

Purpose and Application of Rule 58 & 79(a)

The sole purpose of the separate document requirement which was added to Rule 58 in 1963, was to clarify when time for an appeal under 28 U.S.C. Sec. 2107 begins to run, Bankers Trust Co. v. Mallis 435 U.S. 381, 385 (1978).
The provision is, as professor Moore states, a "mechanical change" that must be mechanically applied in order to avoid new uncertainties as to the date on which a judgment is entered U.S. v. Indrelunas 411 U.S. 219, 222. (1973), Coperton v. Beatrice Pocahontas Coal Co. 585 F. 2d 683, 688 (4th Cir. 1978).

II.
Duty of the Court Clerk

Each clerk of court and his deputies are required to swear upon oath to truly and faithfully enter and record all orders, decrees, judgments, adn proceedings of the U.S. District Court, and Rule 79(a) provides that the clerk shall keep a book known as the civil docket and all judgments shall be entered chronologically in the civil docket, and the entry of an order or judgment shall show the date the entry is made.

18 U.S.C.A. 2073, 2076 provides for a penalty for failure to make an entry, or a false or fictitious entry within his records, if done with intent to decieve, mislead, injure, or defraud.

III.

The Clerk's Breach of Statutory Duty.

On 2-1-73 it became the statutory duty of the court clerk and his deputies to enter the judgment of Judge Will in Brainerd v. Beal 72 C 1571 on the docket sheet and show the date the entry is made. Not only did the clerk fail to show the date of docket entry but then falsely certified that certified that the date 1-30-73 in the left hand margin was the date of entry on the docket sheet, to this court, and this court relying on this certification dismissed the appeal of Brainerd v. Beal supra, at 901.

Thus the harm was done when the false entry of 1-30-73 was made, and the error was compounded by the false certification that the entry was correct.

The Court held in Tcherepnin v. Franz, 570 F. 2d 187 (7th Cir. 1978) at 194, held
...failure of a public official to perform acts required by statute constitutes an actionable breach of a ministerial duty (citations).
In Madox v. Astro Investments 45 Ohio App. 2d 203, 343 N.E. 2d 133, 137 the court concluded that failure of the clerk of court to docket and index certificate of judgment for several days, constituted negligence as a matter of law, and the clerk is liable in a civil action for a negligent omission to perform a statutory duty which proximately causes injury to another, 14 C.J.S. Clerks of Courts; 1250, 1252, 1261; 15 American Jurisprudence 2d 532, Clerks of Court, Section 27; Raitport v. Provident Nat. Bank 451 F. Supp. 522 (1978).

IV.

Absolute Immunity does not Apply

Prior to May 19, 1972, the Clerk of U.S. District Courts were required to provide a bond under statute 28 U.S.C. Section 952 conditioned on the faithful performance of the duties of his office. This Court concluded in Howard v. U.S (1902) 184 U.S. 676, 687, that an individual suitor had course of action on a clerk's bond, and that federal courts had jurisdiction; and that this is what Congress had in mind when they enacted the Statute.
The Court concluded:

> "In our opinion, the bond of the clerk is for the benefit of every suitor injured by the failure of that officer faithfully to discharge his duties or seasonably to record the decrees, judgments, and determinations of the Court" (page 687).

In 1972 Congress enacted H.R. 13150 (P.L. 92-310) U.S. Congress page 2364, abolishing the surety bond requirement as a cost saving measure, and the Federal Government assumes by self-insurance the risk of fidelity loss. It provides that the amount of any loss due to the fault or negligence of a Federal employee shall be charged to the agency's appropriation or other available appropriate fund. The record at page 2365 states:

> "The rationale behind the abolition of the procedure of acquiring surety bonds for Federal employees is that self-insurance is a finacially sound procedure if the self-insurer is able to assume the risk...

> In addition to the ability of the Federal Government to take the risk of loss through the fault or negligence of an employee, statistics show that the cost of the bonding program is greater than the amount of claims filed".

In Williams v. Wood (612 F. 2d 852 5th Cir. 1980), a litigant brought an action against deputy clerk of the Federal District Court, alleging that the clerk had failed to notify the litignat of entry of final judgment and thereby prevented him from appealing. The United States District Court Dismissed the suit on the basis of "absolute immunity", and the Court of Appeals reversed holding:

> "routine duty of cort clerks does not fall within the narrow exception for clerical action explicitly commanded by a cort decree or by judge's insturction. Dismissal of an action is proper only when he is qualified immune." (page 985).

In Henriksen v. Bentley (644 F. 2d 852, 855 10th Cir. 1981) the court traced the history of "absolute immunity" citing Butz, Stump, Imber, Dennis, Smith, Denman, Williams, (cited above) Slotnick, Pierson, Wood, Scheuer, and concluded that a clerk of court has immunity only where he can show that he was acting in pursuant to his lawful authority and following in good faith the instructions of the court and was not in degrogation of those instructions or rules.

Like many states, Illinois accords its executive officials a qualified immunity from suit. Prosser, The Law of Torts 132 at 939 (4th ed. 1971). Illinois law holds that a state official is liable in damages to those he injures if he negligentlhy breaches a ministerial duty or if he wilfully and maliciously breaches a discretionay duty, e.g. Hering v. Hilton, 12 Ill. 2d 559, 562, 147 N.E. 2d 311 (1958); Myers v. Krajefska, 8 Ill. 2d 322, 329, 134 N.E. 2d 277 (1956); People ex rel. Munson v. Bartels, 138 Ill. 322, 328, 27 N.E. 1091, 1092 (1891); Gilbert v. Bone, 64 Ill. 518, 524 (1872); Paoli v. Mason, 325 Ill. App. 197, 209, 59 N.E. 2d 499, 504 (1945). The Illinois Appellate Court reaffirmed and applied these settled principles lately in Hoffman v. Ajack, 57 Ill. App. 3d 744, 373 N.E. 2d 486 (1978).

The Illinois Supreme Court in Munson, supra, defined the ministerial duties of a Court Clerk as follows:

> "Official duty is ministerial when it is absolute, certain, and imperative, involving merely the execution of a set task, and when the law which imposes it prescribes and defines the time, mode, and occasion of its performance with such certainty that nothing remains for judgment or discretion."

B. Rule 58 Judgment Should Be Allowed Under Rule 60(a)

The sole purpose of the separate document requirement which was added to Rule 58 in 1963, was to clarify when time for an appeal under 28 U.S.C. Sec. 2107 begins to run, Bankers Trust Co. v. Mallis 435 U.S. 381, 385 (1978).
The provision is, as professor Moore states, a "mechanical change" that must be mechanically applied in order to avoid new uncertainties as to the date on which a judgment is entered U.S. v. Indrelunas 411 U.S. 219, 222. (1973), Coperton v. Beatrice Pocahontas Coal Co. 585 F. 2d 683, 688 (4th Cir. 1978).

Until such entry is made the time for appeal will not normally run. In Coperton the Court at page 688 concluded:

> "Precise identification of the date on which the judgment was entered is necessary whenever the timeliness of an appeal to this court is in issue... absent entry a party will not ordinarily be found to have exceeded, regardless of when the notice of appeal was filed... nor can we penalize plaintiffs for their procedrual nonchalance by binding them to their erronous assertion that judgments of dismissal had been entered".

The court in Calhoun v. United States(647 F.2d 6,9 9th Cir. 1981) followed the reasoning of Caperton.

C. Absolute Immunity does not Apply to Chief Justice Burger

Chief Justice's Statutory Duties

Pursuant to 28 U.S.C.A. Section 332 Chief Justice Burger is directed to summon annually the Chief Judge of each judicial circuit, to a conference known as the Judicial Conference of the United States for the purpose of submitting suggestions to the various courts in the interest of uniformity and expedition of business. The conference also carries on a continuous study of the operation and effect of the general rules of practice and procedure in use. (Federal Practice and Procedure 32 Am. Jus. 2d Sec. 4).

Also aside from his duty as supervisor or council, Chief Justice Burger had judicial duties enforcing Rule 58 and 79(a), (Count III paragraph 13 of the Complaint).

The broad doctrine of judical immunity does not apply to acts which are not judical, but are purely ministerial, and is responsible for error or misconduct, 48A C.J.S. JUDGES, paragraph 90, page 699.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgments and opinions of the Courts below.

Respectfully sbmitted,

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